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IN THE

Supreme Court of the United States

October Term 1946

No. 255

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, and PERE MARQUETTE RAILWAY COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA, THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN, INCORPORATED, *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, and PERE MARQUETTE RAILWAY COMPANY

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Opinions Below

The opinion of the specially constituted District Court (R. 726) is reported in 50 F. Supp. 123. The supplementary opinion sur form of judgment (R. 759) is reported in 53 F. Supp. 908. The opinion sur judgment (R. 774) is reported in 55 F. Supp. 985. The opinion upon application for approval of sale of The Pullman Company (R. 1193) is reported in 64 F. Supp. 108.

Jurisdiction

The final order and decree of the District Court was entered on January 4, 1946 (R. 1203). Petition for appeal was presented and allowed on March 4, 1946 (R. 1220, 1221). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 936, 938; 28 U. S. C. 345). Probable jurisdiction was noted by this Court on October 14, 1946 (R. 2639).

Statutes Involved

The statutes involved are Sections 1, 2 and 4 of the Sherman Act of July 2, 1890, as amended (26 Stat. 209; 36 Stat. 1167; 50 Stat. 693; 15 U. S. C. 1, 2 and 4), the pertinent provisions of which are as follows:

> Section 1. (As amended by the Act of August 17, 1937, 50 Stat. 693). Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: * * * (15 U. S. C. Sec. 1).
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * * (15 U. S. C. Sec. 2).
>
> * * * * *
>
> Section 4. (As amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167). The several district courts of the United States are hereby invested with

jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations * * * (15 U. S. C. Sec. 4).

Statement of the Case

Pullman Incorporated was found by the District Court to have acquired and maintained a 100% monopoly in the furnishing and servicing of sleeping cars to the railroads, and also in the manufacture of sleeping cars (R. 742). This double monopoly was maintained through two wholly-owned subsidiaries, The Pullman Company, exercising the monopoly in furnishing and servicing cars, and Pullman-Standard Car Manufacturing Company, exercising the monopoly of the manufacturing business.

The District Court found that in order to end the manufacturing monopoly it was necessary to require the complete and perpetual separation of the manufacturing business from the sleeping car service business (R. 744). A majority of the court, Judge Biggs dissenting, determined to allow the defendant to make an election as to which of the two businesses it would sell (R. 759, 761). Pullman Incorporated elected to sell the sleeping car business, and a subsequent order of the court authorized negotiations with the railroads or any other persons for the sale of all of the assets of The Pullman Company or of all of its capital stock (R. 776, 958).

Pullman Incorporated negotiated only with the railroads, and its Board of Directors did not authorize negotiations with any other party. It made an offer to sell all

the capital stock of The Pullman Company to a group of railroads to be formed (R. 2246), but for some months the railroads failed to take any definite action. Then, instead of taking affirmative action, a committee representing the railroads proposed a delay of eighteen months from March 22, 1946 (R. 2046).

Otis & Co., being unsuccessful in attempting to deal with Pullman Incorporated, was permitted to intervene in this case to make a conditional acceptance of the offer of Pullman Incorporated and only after that did the Pullman Incorporated board authorize negotiations (R. 984, 2032, 2056, 2061). Similar interventions for similar purposes were allowed to Glore, Forgan & Co. and Standard Steel Spring Company (R. 1056, 1113). Later the Railroad Buying Group, an association comprising virtually all railroads using Pullman service, was formally organized (R. 1161), and intervened with an acceptance in the nature of a counter-proposition of the offer made by Pullman Incorporated (R. 1141). This was followed by a proposition from Otis & Co. to pay in cash the full amount required by the defendant's offer to the railroads (R. 2085), whereupon the Railroad Buying Group submitted an unqualified acceptance of the offer made by Pullman Incorporated. The latter company then asked the court's approval of a sale to the Railroad Buying Group to be consummated on those terms. The court approved that sale on the conditions set forth in its final order of January 4, 1946 (R. 1203).

Before taking action, the District Court held a hearing for all offerors and other intervenors (R. 2022-2635). The hearing and arguments lasted five days, and although all offerors had the opportunity to submit evidence and

arguments, the court in its opinion stated that *it had approved the acceptance of the proposal of the Railroad Buying Group without undertaking any consideration of the other offers,* simply because "following our direction to sell, it [Pullman Incorporated] now appears with a buyer" (R. 1193, 1199).

The court did not consider the relative merits of the several offers and so was unable to make a finding that the sale to the railroads was the most effective available way to terminate the unlawful monopoly. No such finding was made.

Nor did the court make adequate inquiry as to the effectiveness of the approved plan to accomplish the objectives of the Sherman Act as stated by the court in its opinion of April 20, 1943 and judgment of May 8, 1944.

The plan of the Railroad Buying Group provides, among other things, that during an interim period intended to end not later than December 31, 1948, the railroads, members of the Buying Group, may purchase all assigned cars and unassigned cars as indicated therein (R. 1165, 1166). It further provides that all cars purchased by any railroad, member of the Group, either from Pullman or from any other source shall be leased back to Pullman for the interim period (R. 1165, 1166).

During this period the present pool of sleeping cars will likely disappear and a nation-wide pool, found to be an economic necessity by the court (R. 735, 736), will not be maintained (R. 1197).

This brief deals only with conditions provided by the plan of the Railroad Buying Group for the so-called interim period. There is no contract enforceable by a member of the Group to terminate the interim period on the intended date,

but the agreement gives any such member the right to withdraw if the interim period should be extended (R. 1168). It is not necessary to decide whether a monopoly will continue beyond a termination of the interim period. In any event a monopoly during the interim period is unlawful, even if it could be shown to be temporary.

Questions Presented

1. Does the court's order have the effect of authorizing a continuance of a monopoly of the sleeping car business by preserving the power of The Pullman Company to exclude competitors?
2. Does the court's order assure the complete and perpetual separation of the sleeping car manufacturing business from the business of furnishing and servicing sleeping cars?
3. With four offers before it, did the court have a duty to examine all such offers and then determine the most effective means of ending the unlawful monopoly?

Summary of Argument

The court found that The Pullman Company acquired a monopoly in the sleeping car business by buying the interests of competitors and all available sleeping car equipment, and that the monopoly was maintained primarily by exclusive contracts with the railroads which had the effect of giving the railroads a "stake" in the investment in sleeping car equipment.

The achievement of a complete monopoly of the sleeping car operating business, made it easy to gain a monopoly of the sleeping car manufacturing business by exclusive dealing with an affiliated company under identical ownership.

Having determined that the course of business above described constituted a violation of the Sherman Act, the court decreed the complete and perpetual separation of the manufacturing business from the sleeping car business. Defendant Pullman Incorporated, the owner of both businesses, with the permission of the court to elect which business it would sell, decided to sell the sleeping car business. The court heard statements and arguments from four offerors seeking to buy all the capital stock of The Pullman Company, including a buying group comprising all the railroads using Pullman service. But it gave no real consideration to the other offers. The court merely approved a sale to the buyer selected by Pullman Incorporated, namely the Railroad Buying Group, subject to certain conditions and injunctive provisions.

The necessary result of a sale to a group comprising all Pullman customers and stockholders, is to place the existing monopoly into a new ownership which certainly can, and logically will, exclude competition in the furnishing and servicing of sleeping cars. Thus the existing monopoly of the Pullman operating business will be perpetuated under a different ownership. This is a continuing violation of the Sherman Act.

Although the court found that complete and perpetual separation of the two businesses was necessary to end the manufacturing monopoly, and although it affirmatively noticed the importance of the interlocking relationships between Pullman Incorporated and the railroads and the

railroad financiers, it failed to make a careful inquiry into the relationships which its opinion referred to as "relevant", and failed to consider whether a sale to one of the other offerors would have provided a more certain termination of underlying relationships which are major factors in a monopolistic situation.

The court made no inquiry as to whether one or more of the other offerors might have been wholly independent of any of the "significant" close business relationships, so that a sale to such offeror would insure a complete and perpetual separation in fact. Instead of that, it relied upon a sale to a group which it already knew had interlocking relationships, and sought to regulate this continuing monopoly by injunctions. The injunctions most seriously relied upon were, first, the prohibition of interlocking directorates between the Pullman interests and the railroad interests, not, however, accompanied by any provision concerning the underlying common ownership and control, nor by any order concerning the affiliations of directors to be elected to replace those compelled to resign; and, second, the requirement that sleeping cars hereafter to be purchased by the railroads shall be subject to competitive bidding in the manner prescribed by the Interstate Commerce Commission in connection with the Clayton Act, which requirement hardly meets the realities involved in negotiations for the purchase of railroad equipment so complicated as Pullman sleeping cars.

If the sale is made to a purchaser wholly independent in fact, the injunctive relief concerning the purchase of sleeping cars would not have been necessary. Furthermore, such a sale would assure continuance of the pool of sleeping cars needed to meet season and occasional peak demands.

ARGUMENT

I

The Court's order has the effect of authorizing a continuance of a monopoly of the sleeping car business by preserving the power of The Pullman Company to exclude competitors.

Pullman acquired a monopoly of the sleeping car business by buying competitive enterprises and acquiring ownership of all existing equipment and rolling stock adaptable to the purpose (R. 726-730). The monopoly was perpetuated and tightened up by making exclusive contracts with the railroads,—exclusive in a double sense, in that they prevented the railroads from using the services of anyone in competition with Pullman, and also prevented the railroads from buying and operating their own sleeping car equipment (R. 730-738).

Two principal methods were used by Pullman and condemned by the court in establishing and perpetuating its monopoly of supplying and servicing sleeping cars. The first was the exclusive contracts above referred to, which were made with the several railroads individually for long periods and arranged so that the expiration dates were staggered, and no substantial proportion of the exclusive contracts expired at any one time (R. 733). A second monopolistic method was the contract provision relating to depreciation charges on the sleeping cars, pursuant to which the railroads had to pay, as part of the rental on the cars, an excessive depreciation charge, so that in effect the railroads, by paying such a charge, acquired "a finan-

cial stake" in the ownership of the cars (R. 736, 737). The railroads were allowed to get some benefit out of that stake by renewing their contracts with Pullman, as the cars from time to time were rented at their depreciated value, but this stake would be lost by any railroad which terminated its contract, either to trade with another concessionaire or to purchase and operate its own cars.

These monopolistic practices made it impractical and unprofitable for any railroad to deal with any concessionaire who might attempt competition against Pullman, or even to purchase and operate its own sleeping cars.

In its opinion of December 18, 1945, now under review, the court said: "The thing which got The Pullman Company into trouble was not that it was the only company furnishing sleeping car service but that Pullman made it virtually impossible for anybody else to get into the business" (R. 1198).

The objective of an anti-trust decree must be such a termination of monopolistic strangle-holds as to make it possible for any railroad to own and operate its own sleeping car service if it should choose to do so, and also to open the field so that it would be possible for an independent enterpriser to offer competition in the business of furnishing and servicing sleeping cars, which has been so long monopolized by Pullman.

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

American Tobacco Co. v. *United States*, 328 U. S. ; 90 Law Ed. 1095;

United States v. *Aluminum Company of America*, 148 Fed. (2d) 416;

Ethyl Gasoline Corporation v. *United States*, 309 U. S. 436.*

The first of these possibilities might have been accomplished by the action of the District Court, if it had not approved a contract between Pullman and the Railroad Buying Group providing that all sleeping cars bought by any member of the Group, either from Pullman or elsewhere, must be leased back to Pullman for assigned service on the lines of the owning railroad (R. 1165, 1166).

As to the possibility of concessionaire competition, the plan approved by the court's order of January 4, 1946, makes it impossible "for anybody else to get into the business". Remembering that the court found that an effective means of compelling railroads to deal with Pullman exclusively had been the contract provision which required the railroads to pay excessive depreciation charges and thereby in effect to acquire a "stake" in the cars, it is significant that the new arrangement now approved by the court has increased the railroads' "stake" in the sleeping cars to full ownership. Virtually every railroad having sleeping car operations has joined the Railroad Buying Group, thereby becoming, under the approved plan, a stockholder of Pullman in the exact proportion of its own sleeping car operation (R. 1166, 1167).

The court did enjoin the making of exclusive operating contracts between Pullman and the railroads. But, since the approved plan provides that all the customers of Pullman shall at the same time be its sole creditors and stock-

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* In this case this court stated (p. 461) that the duty of the court is "to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival."

holders, all in the same proportion, the possibility of competition by an independent concessionaire is still effectively excluded.

If, then, at a time before the commencement of this anti-trust suit, a prospective new enterpriser had surveyed the field with a view to the possibility of offering competition against Pullman under the conditions then prevailing, he would have found the intolerable monopolistic condition that every railroad operating sleeping cars was bound by an exclusive operating contract with Pullman, and also had a "stake" in those cars. In practical effect this made it impossible for any railroad to deal with a competitor of Pullman. The court well said that such a condition "made it virtually impossible for anybody else to get into the business" (R. 1198).

And now if such an independent enterpriser should today survey the condition which will result from the plan approved by the order of the court, he will find that "exclusive dealing contracts" are no longer needed, since every railroad operating sleeping cars is tied in as creditor and stockholder to Pullman, a monopoly operating all the sleeping cars in the country with express authority of the court. He must, therefore, find that under the conditions authorized by the court order it is not only virtually impossible, but absolutely impossible, "to get into the business".

The court's opinion of December 18, 1945, states the effect of its order in these words: "A railroad may join with others and use exclusively the services of Pullman. It may do part of that service itself or through some other concern of its own choosing* [though as we have just seen

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* Matter in [ ] is our own comment.

no independent concessionaire can exist] and ask Pullman to do the rest. It may own all of its own sleeping cars, or part of them, or none of them. [But any cars it owns must be leased back to Pullman.] All of this is provided for in our judgment. There is, then, no strangle-hold on the sleeping car business by a railroad owned Pullman Company or anyone else. Therefore there is no unlawful monopoly" (R. 1198).

The court, having found exactly why it has been impossible for anybody else to get into the business, has permitted the monopolistic situation to be strengthened; and yet by decree gives to each railroad the right to deal with "some other concern of its own choosing", without any indication as to how "some other concern" can "get into the business" against the monopolistic barrier which the court condemned and then failed to strike down.

The Railroad Buying Group has organized to take over and continue a monopoly which has been held to be unlawful. Under the new ownership the monopoly conditions are fortified more strongly than ever against the possibility of independent competition. If, as the court indicates, the ownership transmutes Pullman from an unlawful to a lawful monopoly, it is not because it is any the less a monopoly, or any the less strongly entrenched. The power to exclude concessionaire competition is complete, and all railroads are contract bound to lease back to Pullman all sleeping cars they may acquire. This constitutes a continuing violation of the Sherman Act. *American Tobacco Company* v. *United States*, 328 U. S. —, 90 Law Ed. 1095.

A sale of the Pullman stock to an independent purchaser without an agreement to lease back railroad-owned

cars would at once open the field to possible competition, and would effect a complete separation of the servicing from the manufacturing business. The injunctive provisions in the court's decree of May 8, 1944, would then be fully effective. A court order prohibiting exclusive operating contracts addressed to an independent concessionaire would have a meaning and force which it cannot have against a corporation wholly owned by all its customers.

The Sleeping Car Pool

The plan offered by the Railroad Buying Group and approved by the court fails to assure the maintenance of an adequate pool of sleeping cars to meet seasonal and through line service requirements, especially of the smaller passenger-carrying roads. On the contrary, the plan provides that during an interim period, intended to end not later than December 31, 1948, the railroads, members of the Buying Group, may purchase all assigned cars and unassigned cars as indicated therein (R. 1165, 1166). That The Pullman Company under railroad ownership will not purchase any new sleeping cars is recognized by the court in the following language: "* * * we do not think it likely that the Pullman Company, itself, will purchase any sleeping cars" (R. 1197). Indeed, under the plan it is proposed during the interim period, to pull the pool apart and reduce The Pullman Company to a servicing organization to be sold, as such, to an independent buyer (R. 1164-1166). During this interim period no new cars are likely to be added to the pool as the railroads are purchasing large quantities of new cars for their own use (R. 2546, 2547). Thus it appears that a nation-wide pool of sleeping cars which the court found an economic necessity (R. 735, 736), will

not be maintained by The Pullman Company under the plan approved by the court. By the end of the interim period the financially strong roads will have achieved a dominant position in sleeping car supply and the weaker roads will be compelled to look to them for their needs, a competitive disadvantage (R. 2090, 2093).

While under the plan these cars will be leased to The Pullman Company, they will be operated solely on the line of the purchasing road (R. 1165). Smaller passenger-carrying railroads, unable to purchase sleeping cars for their seasonal or through line requirements will become dependent upon the larger railroads for such needed cars (R. 2090-2093).

The plan provides that Pullman stock shall be held in proportion to the sleeping car business operated by the respective roads (R. 1166, 1167). This would place effective control of The Pullman Company in the hands of two of the largest sleeping car users, namely, the Pennsylvania and New York Central railroads, and this domination is further implemented by the method of selecting directors (R. 1168, 1169).

The Pullman stock should be sold to a purchaser completely independent of the railroads and of Pullman-Standard. Such a purchaser would have a profit motive to maintain and develop a pool of sleeping cars as The Pullman Company has done in the past. All parties agree, and the court found (R. 735, 736), that this feature of Pullman service is necessary.

II

The Court's order does not assure the complete and perpetual separation of the car manufacturing business from the business of furnishing and servicing sleeping cars.

We have said that the monopoly of furnishing and servicing sleeping cars is, by the court's order, permitted with greater certainty than ever to exclude the possibility of competition by any rival concessionaire in such business, and that power to exclude competition is not diminished by injunctive requirements directed to a company whose stockholders and creditors are identical with its customers.

The failure of the court to end effectively the condition which created the monopoly of sleeping car service is accompanied by its failure to assure effectively the complete and perpetual separation of the manufacturing business and the service business, which was declared by the court to be a major objective.

The court's final judgment of May 8, 1944 contains the following: "It is a purpose of this judgment to separate completely and perpetually the sleeping car business from the manufacturing business and to separate completely and perpetually the ownership and control of each business from the ownership and control of the other irrespective of who owns or controls such businesses" (R. 766).

Complete and perpetual separation can be safely assured by a sale of the Pullman stock to a wholly independent purchaser, but a sound determination as to who is a wholly independent purchaser cannot be made without careful investigation. The court's opinion of January 22, 1944, says that the "Pullman Company and Pullman-Standard

will not only be separate entities in law but owned separately in fact" (R. 760). And this statement follows alongside the following: "Our conclusion is that the public interest requires the complete separation in ownership and direction of the business of manufacturing and the business of operating sleeping cars" (R. 759) The opinion from which these sentences are taken follows by a few months an opinion of the court (April 20, 1943) which contained the following very wise appraisal of the problems involved in dealing with a major monopoly such as Pullman:

> "Relevant also is the fact that the Pullman business enterprises have been and are intimately associated with other large scale business of the country, especially railroad transportation, through a number of common directorates. Thus H. S. Vanderbilt and George Whitney, directors of the New York Central, are also directors of the Pullman Company and Pullman, Inc. The association with the Pennsylvania Railroad is through directors D. R. McLennan and R. K. Mellon who are also directors of the two Pullman companies as are J. R. Morron, a director of the Alton and Baltimore & Ohio railroads, and H. S. Sturgis, a director of the Delaware, Lackawanna & Western Railroad Company.
>
> The significance of such interlocking directorates is not that their existence, by themselves, constitutes a violation of the Sherman Act. They did raise problems for Pullman in connection with the Clayton Act and the evidence shows concern manifested by Pullman's officers to find a way that they considered valuable directors could be retained without running afoul of the statute. Aside from this, however, the advantage of having persons of business prominence and influence ultimately associated with the Pullman enterprise, especially when such persons had their

> connections directly with railroads or with the source of railroad financing is clear. Standing alone it does not constitute a violation of the Sherman Act, but it is significant for consideration as one of the figures in the whole picture through which a complete control of sleeping car transportation was accomplished and is maintained." (R. 738, 739)

In that opinion the court showed its understanding of the significance of interlocking directorates, which, as the court well said, was not of itself any violation of the Sherman Act. Yet the court seemed to understand well that the fact that there were interlocking directorates indicated an underlying community of interest among the controlling owners of the separate enterprises, including Pullman Incorporated, the railroads, and the railroads' bankers. The order of January 4, 1946, however, though it attributes importance to the fact of interlocking directorates, fails to go below that surface indication, to the deeper question of "community of ownership or control," referred to in the judgment of May 8, 1944 (R. 767).

The complete and perpetual separation of ownership and control, which was the court's original objective, could, of course, be accomplished by a realistic separation of ownership, as the court indicated in its judgment of May 8, 1944. But it would be futile to attempt to imagine all of the injunctions and all of the policings that will be necessary to implement control in the public interest of an operation of these enterprises in the absence of such realistic separation of ownership. It would be impossible to suggest in how many ways the court's basic purpose might be thwarted.

However, it is easily possible to illustrate the difficulties that must beset this attempt to regulate monopolistic prac-

tices. For example, the court's order which caused the resignation of certain directors named by the court may well be the means of tightening a previously loose control of Pullman Incorporated and consequently of Pullman-Standard. One of the directors of Pullman Incorporated named by the court in its April, 1943, opinion as having an interlocking position was Richard K. Mellon (R. 739), a director and large stockholder of Pullman Incorporated, and also a director of the Pennsylvania Railroad, the largest member of the Railroad Buying Group, and consequently the largest, and possibly dominating, stockholder of Pullman under its proposed new ownership. Mr. Mellon's resignation was called for in no uncertain terms by the order of the court, but when he resigns from the board of Pullman Incorporated, there is nothing to prevent his being replaced by a close business associate, even by the president of the very bank of which Mr. Mellon is chairman of the Board.

The resignations of Mr. Vanderbilt, Mr. Whitney and Mr. Sturgis were called for by the opinion and order of the District Court (R. 738, 739, 1197, 1204). They may have resigned as directors of Pullman Incorporated. But no order restricted the selection of their successors on the board. No order restricted the number of directors who may be selected from among full time employees of the company having a natural loyalty to the dominating stockholders. There is nothing in the court's order to prevent a directorship going to a full time employee of Pullman Incorporated or one of its subsidiaries. There is nothing to prevent a directorship going to a lawyer long on the payroll of Pullman Incorporated or one of its subsidiaries. There is nothing to prevent a reduction in the size of the

Board of Pullman Incorporated so that thereby the proportionate voting power of the full time employee directors is increased. It is indeed probable that the Mellon control of Pullman Incorporated will be increased from a minority moral control to an actual numerical control of the Board, by the aggregate of shifts in the Board produced by the very resignations which the court demanded, through well advised replacements in ways herein suggested that do not violate any court order.

It is significant that the Mellon ownership and control of Pullman Incorporated shown by the record in this case was specifically noticed in the opinion of the District Court, as was his prominent position in The Pennsylvania Railroad (R. 738, 739). Yet, without investigation, without even further mention of this "relevant" and "significant" interlocking position, the court presumes that there has been a complete separation between Pullman-Standard on the one side and Mellon and his Pennsylvania Railroad interest on the other, if only he determines to resign as a director of Pullman Incorporated, though he be replaced by his partner.

Similarly, the court's opinion of April 20, 1943 drew definite attention to the connection between the Pullman enterprise on the one hand and the railroads and their bankers on the other. To quote again: "The advantage of having persons of business prominence and influence ultimately associated with the Pullman enterprise, especially when such persons have their connections with railroads or with the source of railroad financing, is clear" (R. 739).

This was an element in helping the court to determine that a monopolistic situation existed, and so it must be a

subject that ought to be explored in connection with the question of whether there is a complete and perpetual separation of the ownership and control as between Pullman-Standard and The Pullman Company sought to be acquired by the railroads. It does not seem realistic to imagine that the resignation of three or four interlocking directors would have any important effect on the ultimate ownership and control of these enterprises, and in its earlier opinion the court indulged in no such imagination. Its latest order, however, seems to assume that the removal of interlocking directorates is a final end of all the interlocking controls. It is really but a surface indication.

This is particularly significant in view of the court's final judgment, above referred to, requiring a complete separation of the sleeping car and manufacturing businesses and the ownership and control of each from the other irrespective of who owns or controls such business (R. 766).*

The court in its opinion of December 18, 1945, seemed to recognize that it had failed to achieve a complete and permanent separation of the sleeping car business and the manufacturing business. This is shown by its reliance upon competitive bidding to restore competition in the manufacturing of sleeping cars. The court said "The requirement for competitive bidding will, we think, shut off the last possibility of any untoward influence of Pullman

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* As Mr. Justice Murphy aptly stated in *North American Co.* v. *Securities and Exchange Commission*, 328 U. S. —; 90 Law Ed. 737, at page 740:

> "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. * * * Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of inter-corporate relationship."

Standard following sleeping cars into the hands of the people who now take over" (R. 1197).

The requirement for competitive bidding does not meet the realities of the situations involved in negotiating for the purchase of Pullman sleeping cars. Manufacture of such cars creates serious and difficult engineering problems, and because of their particular style, design and structure, require detailed and complicated specifications, costly to prepare, and differing substantially among buyers and suppliers. Thus the competitive bidding requirement, because of its inherent deficiencies, may not cure the evil sought to be eliminated.

In its opinion of January 22, 1944, the court took the position that complete and perpetual separation of these businesses precluded any need for competitive bidding. It said: "Since separation is to be effected and since the Pullman Company and Pullman-Standard will not only be separate entities in law *but owned separately in fact*,* we see no reason why Pullman's future purchases of cars need be subjected to rules of competitive bidding" (R. 760). The correctness of this statement cannot be challenged for if The Pullman Company and Pullman-Standard are "owned separately in fact", they will deal at arms-length on the same basis as any other independent companies. Conversely, if they are not owned separately in fact, there is nothing in the record in this case which justifies reliance upon the effectiveness of the competitive bidding requirement to compel real competition.

Continental Insurance Co. v. *Reading Co.*, 259 U. S. 156;

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* Italics supplied.

United States v. *Southern Pacific Co.*, 259 U. S. 214;
United States v. *Lehigh Valley Railroad Co.*, 254 U. S. 255.

III

The Court had a duty to examine all offers and determine the most effective means of ending the unlawful monopoly.

As stated, the record shows that proposals to buy from Pullman Incorporated the capital stock of The Pullman Company were submitted to the court by Otis & Co., by Glore, Forgan & Co., and by the Standard Steel Spring Company, as well as by the Railroad Buying Group. All these parties were intervenors and presented testimony and argument to the court in behalf of the several proposals.

The court's opinion of December 18, 1945, makes it clear that the proposals, other than that of the railroads got no real consideration. To quote from the court's opinion: "Approval of the sale to the railroads does not imply disapproval of other bidders. We are much impressed with all of them. We do not approve Pullman's selection because it has chosen the bid that brings it what it regards as the most favorable terms. We approve it because, following our direction to sell, it now appears with a buyer" (R. 1199).

Obviously in approving a sale the court must find that the proposed sale is adequate to accomplish the purpose of ending an unlawful monopoly. We have argued that the court's order does not accomplish that purpose. But in

addition to that consideration, and even if a given proposal might be adequate to end the monopoly, we submit that when several proposals are actually presented in good faith to the court, the court owes a duty to investigate and study each one. Only after such investigation and study can it really decide which offer, or which combination of features drawn from several offers, would best effectuate the purpose of terminating the monopoly.

Such investigation might include not only the relative competence of the several offerors, but it should certainly include a careful examination as to which of them is really independent of the enterprise from which the separation is required. It should cover the question of which offeror is best qualified and most disposed to serve the public interest by maintaining a nation-wide pool of sleeping cars for the benefit of the smaller railroads, and for adequate service of seasonal or other peak demands and for through line requirements. It should also disclose which of the offerors is most able and independent with respect to the acquisition of new cars through free competition among manufacturers, to the end that the best possible fleet of sleeping cars may be available for the service of the public.

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

Continental Insurance Co. v. *Reading Co.*, 259 U. S. 156;

United States v. *Union Pacific Railroad Company*, 226 U. S. 61; and 226 U. S. 470;

United States v. *American Tobacco Co.*, 221 U. S. 106;

United States v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127.

Conclusion

The Pullman Company's complete monopoly and power to exclude all competition in the business of furnishing and servicing sleeping cars will not be diminished by a change in the ownership of its capital stock as provided in the plan approved by the District Court, nor can competition be created by its injunction. Pullman-Standard's complete monopoly of manufacturing sleeping cars can be broken by a complete and perpetual separation of that business from the sleeping car operating business, but such separation must be a separation of ownership in fact. It cannot be assured by injunctions. Therefore the court's order of January 4, 1946 should be reversed and the cause remanded with instructions to effectuate a separation of the manufacturing from the operating business by causing one of the businesses to be sold, in such manner, after full inquiry, as to insure the complete and perpetual separation of ownership and control and most effectively to insure the carrying on of the business in the public interest.

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